Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

JOHN MURRAY, DIANE MURRAY, and PATRICIA BRENNAN, Individually and as the Executrix of the Estate of RICHARD MARKFELDER, Deceased, VAGN CHRISTIANSEN and MAUREEN CHRISTIANSEN,

*Petitioners*,

*v.*

CONNETQUOT CENTRAL SCHOOL DISTRICT OF ISLIP, DR. JOSEPH LARIA, Individually and as Superintendent of Schools of the Connetquot Central School District of Islip, DR. ANTHONY J. PECORALE, Individually and as the former Superintendent of Schools of the Connetquot Central School District of Islip, JOHN MALONEY, Individually and as the former Superintendent of Schools of the Connetquot Central School District of Islip, COUNTY OF SUFFOLK, COUNTY OF SUFFOLK DEPARTMENT OF HEALTH SERVICES, DR. CLARE B. BRADLEY, Individually and as Commissioner of the Suffolk County Department of Health Services and DR. MARY HIBBERD, Individually and as the former Commissioner of the Suffolk County Department of Health Services,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Did the District Court order granting judgment dismissing Petitioners due process and equal protection claims, and the Court of Appeals affirmance, deny the Petitioners due process and equal protection of the law, as did the actions and conduct of the named Respondents, by refusing to recognize a clearly established and protected constitutional right to be free from arbitrary and intentional conduct by a governmental employer, and other municipal parties, that shocks the conscience, in willful, wanton and reckless disregard for the employees health and safety, and place the Court of Appeals for the Second Circuit in direct conflict with the Court of Appeals for the Third Circuit (*Eddy v. Virgin Islands Water and Power Authority*, 256 F.3d 204 (3d Cir. 2001), the United States Court of Appeals for the Sixth Circuit, *Upsher v. Grosse Pointe Public School System*, 285 F.3d 448 (6th Cir. 2002) and the United States Court of Appeals for the Tenth Circuit *Sherwood v. Oklahoma County*, 42 Fed. Appx. 353 (10th Cir. 2002) WL 1472197 (2002)?

2. Does the workers right to be protected in the work place from life threatening, environmentally hazardous, carcinogens and toxic conditions caused, created, continued, knowingly permitted and willfully continued as a result of gross negligence, and the wanton, deliberate and intentional indifference of the municipal Respondents, present a constitutionally recognized right entitled to due process and equal protection of the law, and provide a viable cause of action under 42 U.S.C.A. § 1983 as properly pled by the Petitioners?

3. Did the actions of the District Court, and the Court of Appeals, in limiting and precluding Petitioners rights to full discovery, and deciding the Respondents motions to dismiss under the "heightened pleading standard" expressly abolished by this Court in *Leatherman v. Tarrant County, Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993) and *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002), and the standards of proof more properly applicable to motions for summary judgment, effectively deny the Petitioners due process and equal protection of the law?

4. Did the actions of the District Court, and the Court of Appeals, effectively grant the Respondents an unwarranted immunity from suit, and improperly shield them from the imposition of clear and absolute liability, solely on the basis of their status as municipalities, and in utter disregard of the real issues, the merits, the governing case law, and Petitioners absolute entitlement to full discovery and trial?

## PARTIES TO THE PROCEEDING

Diane Murray is a Petitioner, Individually and as the Nominated Executrix of the Estate of John Murray, who is now deceased.

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JOHN MURRAY, DIANE MURRAY, and PATRICIA BRENNAN, Individually and as the Executrix of the Estate of RICHARD MARKFELDER, Deceased and VAGN CHRISTIANSEN and MAUREEN CHRISTIANSEN, Petitioner(s), by undersigned counsel, under appropriate rules of this Court, most respectfully request that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

## OPINIONS BELOW

By Memorandum of Decision and Order of January 29, 2002, Judge Denis R. Hurley granted the individual motions to dismiss instituted by the respective Defendants, namely, the Connetquot Defendants and the Suffolk County Defendants, pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. JUDGE Hurley dismissed the Petitioners due process and equal protection causes of action, denied the Petitioners cross-motion to further amend the complaint and to file a late jury demand as moot, and remanded all remaining state law claims to the Supreme Court of the State of New York, County of Suffolk for all further proceedings and disposition, pursuant to 28 U.S.C.A. § 1447(c), finding no continued basis for federal jurisdiction. Judgement was then entered by the Clerk of the District Court, in accordance with the foregoing, on February 6, 2002.

Petitioners thereafter noticed an appeal to the United States Court of Appeals for the Second Circuit. The appeal was perfected and fully briefed, and orally argued on December 3, 2002. By Summary Order and Judgment of December 16, 2002, the United States Court of Appeals for the Second Circuit vacated the Judgement in part directing that the dismissal be without prejudice the rights and claims

of Petitioner JOHN MURRAY, Deceased, and Petitioner RICHARD MARKFELDER, Deceased, pending the appointment and substitution of their estate representatives. Petitioner PATRICIA BRENNAN initially received Preliminary Letters Testamentary from the Surrogate's Court of Suffolk County New York but the admission of the Will to probate was delayed by objections to probate filed by the daughter of RICHARD MARKFELDER. Those Objections have now been resolved and discontinued, the Will has been admitted to probate and full Letters Testamentary have been issued to PATRICIA BRENNAN as the duly appointed Executrix of the Estate of Richard Markfelder. Petitioner PATRICIA BRENNAN has asserted causes of action for wrongful death and conscious pain and suffering in the remanded action currently pending in Supreme Court. Suffolk County. Petitioner DIANE BRENNAN is the Nominated Executrix of the Estate of Petitioner JOHN MURRAY pursuant to his Last Will and Testament.

With the exception of vacating the Judgment of the District Court to direct that the claims of JOHN MURRAY AND RICHARD MARKFELDER, Deceased , be dismissed without prejudice, the Court of Appeals affirmed in all other respects. The Petitioners instituted a Petition for rehearing, and rehearing en banc, on December 27, 2002. The Petition was denied in its entirety pursuant to the Order of the Court of Appeals of February 11, 2003.

## STATEMENT OF JURISDICTION

Subject matter jurisdiction of this matter is based upon the following:

The action was originally commenced in Supreme Court, Suffolk County on August 3, 2000. It was thereafter removed by the defendants by the filing of a joint petition for removal on September 11, 2001 pursuant to 28 U.S.C. § 1441. The action was thereafter prosecuted in the United States District Court for the Eastern District of New York with subject matter jurisdiction being based, *inter alia*, upon 28 U.S.C. § 1331, 28 U.S.C. § 1343(3) and 28 U.S.C. § 1367. The Petitioners federal law claims were dismissed by Order of January 29, 2002, and a Judgment entered thereupon on February 6, 2002. 28 U.S.C.A. § 1447(c).

Subject matter jurisdiction of this matter before the United States Court of Appeals for the Second Circuit was thereafter based upon the provisions of 28 U.S.C. § 1291.

The Second Circuit vacated the judgment in part and affirmed in all other respects by summary Order and Judgment of December 16, 2002. A petition for rehearing, and rehearing en banc, was denied by the Second Circuit by Order dated February 11, 2002.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment XIV Section 1, 28 U.S.C. §§ 1331, 1343(3) and 1367, 42 U.S.C. § 1983, 42 U.S.C. § 1988.

The United States Constitution, Amendment XIV section 1 provides as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 provides in relevant part as follows:

> Section 1983. Civil action for deprivation of rights.
>
> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the constitution on laws, shall be liable to the party injured in an action at law, suit an equity or other

proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officers judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purpose of this section and Act of Congress Applicable Exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

## STATEMENT OF CASE

This is an action in which the Petitioners prosecute causes of action based, *inter alia*, upon violation of their recognized and protected constitutional rights to due process and equal protection of law. The violations of those rights by the Respondents arose by virtue of their actions, under color of state law, in arbitrarily, intentionally and continuously exposing Petitioners JOHN MURRAY, RICHARD MARKFELDER and VAGN CHRISTIANSEN, to carcinogenic materials and toxic conditions in their workplace at the Connetquot bus garage. The conduct complained of was in furtherance of customs, practices, policies and procedures, the hallmarks of which were and intentional and reckless disregard for, and wilful and deliberate indifference to, the Petitioners constitutionally protected rights to life, health and safety .They also prosecute state law claims based upon negligence, breach of contract, breach of the implied covenant of good faith and fair dealing in employment relationship, and now prosecute wrongful death and conscious pain and suffering claims on behalf of the Estate of Richard Markfelder. A wrongful death

and conscious pain and suffering claim on behalf of JOHN MURRAY and his distributees will also be prosecuted.

It is the Petitioners contention that in the course of their employment as garage mechanics at the Connetquot Central School District bus garage, the aforementioned Petitioners were continuously, intentionally and repeatedly exposed to environmentally hazardous and toxic chemicals and carcinogenic substances in and around the workplace as well as contaminated air and other environmentally hazardous materials. As a result of this exposure, Richard Markfelder died on January 1, 2001 as a result of nonlymphoma Hodgkins disease. John Murray died on November 23, 2001 as a result of colon and liver cancer, and their sequellae.

During the years of their employment and exposure, the Connetquot Central School District and other named Respondents herein were fully aware of the environmentally hazardous conditions which they caused, permitted and willfully allowed to continue in willful disregard for the health and safety of the Petitioners while requiring the plaintiffs to continue to work in such conditions. In contrast, the deposition testimony of Connetquot witnesses (which the District Court declined to consider) established that their former Superintendent, Respondent John Maloney, and the Assistant Superintendent for Business, James Marran, were fully aware of these conditions and yet delayed remediation and allowed them to continue while in contrast, they acted immediately and expeditiously with regard to the remediation of asbestos and other environmentally hazardous conditions in the school buildings and administration building for the benefit of other District employees. The Suffolk County Respondents who had responsibility for enforcement of the Suffolk County Health Code, and other laws and regulations

with regard to these environmentally hazardous conditions admittedly inspected the premises and were aware of the environmentally hazardous conditions. In contrast to the performance of their enforcement duties with regard to other municipalities and non municipalities, they allowed these conditions to continue and took no action to compel full remediation for years on end.

This is an action in which the Petitioners allege violations of their due process and equal protection rights for their health, safety and well being without being subjected to environmentally hazardous toxic substances and carcinogens and other environmentally hazardous conditions knowingly, intentionally and deliberately created, or allowed to continue by the Respondents and each of them.

The action was originally commenced in the Supreme Court of the State of New York, County of Suffolk on or about August 3, 2000. The action was thereafter removed by the defendants filing of a joint petition for removal, pursuant to 28 U.S.C. § 1441 on September 11, 2000. The action was removed to the United States District Court of Eastern District of New York where it was thereafter prosecuted.

During the course of the litigation in the United States District Court, Eastern District of New York before Judge Denis R. Hurley, and Magistrate Arlene R. Lindsay, the Petitioners were repeatedly denied discovery from the Suffolk County Respondents, to wit, the County of Suffolk, the County of Suffolk Health Department, the County of Suffolk Health Commission, Clare Bradley and former Commissioner of the Department of Health Services, Dr. Mary Hibberd. Magistrate Judge Lindsay repeatedly granted stays denying the Petitioners all but the most minimal discovery from those defendants.

Limited discovery was permitted of the Connetquot Respondents in the form of document disclosure and depositions of Respondent John Maloney, former Superintendent of Schools, James Marran, former Assistant Superintendent for Business and others. That discovery, although not considered by the District Court, established, inter alia, the knowledge and awareness of Maloney and Marran of the conditions complained of, their failure to act and their admissions that such failure to act constituted a discriminatory violation of their own custom, practice, policy and procedure for the health and safety of all Connetquot employees, all engaged under color of state law.

**A. Decision and Opinion of the United States District Court, Eastern District of New York Denis R. Hurley, January 29, 2002.**

In its Decision and Opinion of January 29, 2002 (Appendix at pages 8a-19a) the District Court applied a narrow analysis with regard to clearly recognized and constitutionally protected rights of these Petitioners. The District Court's application of a heightened pleading standard repeatedly criticized and abolished by this Court, all resulted in the erroneous dismissal of the plaintiffs Federal law claims under the due process and equal protection clauses of the Fourteenth Amendment. Furthermore, although brought to the attention of the District Court, and more fully brought to the attention of the Court of Appeals, the courts below overlooked the fact that the Petitioners' rights to safety for their health and security, and preservation of their very lives, without being subjected to the wanton and deliberate indifference, and actions constituting arbitrary and intentional violation of those rights, is an actionable cause(s) of action. In doing so, the courts below ignored their own case precedents as well as the conflicting case precedents of the United States Courts of Appeal for the Third, Sixth and Tenth Circuits.

At page 3 of the District Courts Decision and Order (Appendix, page 10a), the Court seemingly acknowledged the well established proposition that the standard to be applied in deciding a Rule 12 (c) motion is not if the plaintiffs will prevail but whether they should be allowed to offer proof. *Village Pond Inc. v. Town of Darrien*, 56 F.3d 375, 378 (2d Cir. 1985). The District Court then proceeded to abandon and ignore that standard.

The District Court, at pages 3 and 4 of its Decision and Order (Appendix, pages 10a-11a), held that the complaint has redundant verbiage and "does not describe the due process claim with any degree of specificity". As noted herein the constitutionally protected civil rights of these Petitioners were fully specifically and sufficiently articulated as were viable due process and equal protection causes of action. If the District Court had devoted less time to dicta, and had properly analyzed the allegations of the complaint, and the governing case law, the motions would have been properly denied.

In further error, the District Court at page 4 (Appendix page 11a) stated that the Petitioners must show under the due process cause that they were deprived of life, liberty or property at the hands of the state and that "the plaintiffs do not specifically allege the specific rights they claimed were denied without due process". The District Court then arbitrarily concluded that:

> Distilling this to its essence, it appears to the Court that the plaintiffs primarily allege the denial of the right to a safe workplace.

Appendix, page 12a.

This finding clearly shows a lack of true analysis of the allegations of the complaint, allegations which clearly allege arbitrary and conscious shocking conduct in the fullest

constitutional sense. It is based upon an assumption or a conclusion that the rights violated by these plaintiffs are not of constitutional dimension, which they clearly are. It is based upon an erroneous evaluation, analysis and conclusion that the plaintiffs cannot prevail at trial rather than an application of the Rule 12(c) motion standard whereby the District Courts function was simply to determine whether or not the plaintiffs should be allowed to offer proof at trial. In a word it also demonstrates an absence of a full evaluation of the complaint since all of the requisite elements of a due process and equal protection claim were asserted as were constitutionally recognized and protected civil rights.

The District Court further erred by finding that under the special duty basis of liability, liability could only be imposed if the Petitioners had been restrained. Once again this reasoning ignored the scope of protection accorded to employees who are deliberately, arbitrarily and intentionally exposed to workplace harm as a result of an admitted custom, practice, policy, procedure and course of conduct of deliberate indifference, under color of state law, and intended to cause the Petitioners harm. The District Courts Decision and Order is an adoption of an "unequal protection of law" standard whereby prison inmates and those confined are the only persons who could possibly be accorded equal protection and due process protection under the state created danger exception to an absence of liability. On the facts alleged in the Petitioners complaint, the dangers complained of were created by these Respondents; were knowingly and intentionally created by them; were created and allowed to continue and were imposed upon the Petitioners as a condition of their continued employment. Under the concepts of violation of due process and equal protection of law, and under the concept of a special duty undertaken and imposed

under the state created danger exception to non liability, the Petitioners are entitled to offer proof and should prevail.

In further analysis of the Petitioners due process cause of action the District Court found, at page 7, (Appendix, page 14a) that the state created danger theory does not elevate every action exposing one to risk of harm to the level of due process claims, analogizing to a traffic light which is not properly timed or a slippery floor in a county office building. This commentary exemplifies the bias and prejudice of the District Court. It also exemplifies the District Courts unwillingness to properly and fully analyze the allegations of the complaint which go far beyond a mere allegations of an act or omission, and rise to the level of viable due process and equal protection claims. To analogize the valid claims of two fine men, who have lost their lives, to the improper timing of the traffic light, or a slippery floor, shows an inherent bias, prejudice and disdain for what was and are a meritorious causes of action. Furthermore, by refusing to allow this case to proceed with full discovery of the Suffolk County Respondents, and a trial, the District Court failed to allow the Petitioners an opportunity to demonstrate that the due process and equal protection violations were accomplished not only through state actions, but by the actions of private third parties who were hired, retained and directed by the Respondents thereby casting the Respondents in the roles of individuals and entities directing and aiding the violations. In a word, there was and is a constitutional entitlement and civil right to health and safety without arbitrary, intentional, deliberate and egregious exposure to hazardous, life threatening conditions created by state actions, knowingly and intentionally created by the state actions, and allowed to continue under required exposure in the course of continued employment.

The District Courts conclusions in dismissing the equal protection claims were equally unwarranted. The complaint alleged differing treatment based upon invidious discrimination or unequal treatment and protection of the law as opposed to other persons similarly situated, all in violation of undeniably established recognized and protected liberty interests and civil rights entitled to the fullest protection of the law under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

**B. Opinion of the United States Court of Appeals for the Second Circuit of December 16, 2002.**

In its Decision, Order and Judgment of December 16, 2002 the United States Court of Appeals for the Second Circuit did recognize the Petitioners claims of exposure to carcinogens by deliberate indifference of the Respondents to the Petitioners rights to health, safety and well being, but again concluded that the allegations of the complaint did not allege deprivation of a "legally cognizable constitutional right" relying upon the minimal level of workplace safety analysis announced by this Court in *Collins v. City of Harker Heights*. In so doing, the Court of Appeals overlooked the exception recognized by this Court in *Collins* for reckless and deliberately indifferent conduct intentionally causing harm and injury, and which shocks the conscience. This is such a case.

In the Petitioners brief, and at the oral argument, the Court of Appeals was fully advised of the decisions in *Upsher v. Grosse Pointe School District* and *Eddy v. Virgin Island Power Authority*. In addition, the more recent decision in *Sherwood v. Oklahoma County* was brought to the Courts attention. Despite it being demonstrated at oral argument that

the rights violated in this case are of constitutional dimension and entitled to constitutional protection, and despite being advised that the Second Circuit, by affirming, would stand in conflict with the case precedents of three (3) other circuits, the Court of Appeals affirmed dismissal of the due process and equal protection claims of these Petitioners.

The Second Circuit also held, in effect, that while the Petitioners had alleged that they were discriminated against as municipal employees, that they were required to *allege*( *and impliedly demonstrate*) how others "similarly situated" were subject to different treatment or "what impermissible consideration motivated the selective treatment". Petitioners pled a legally sufficient equal protection cause of action under Rules 8 and 9 of the Federal Rules of Civil Procedure. It is submitted that this finding and conclusion by the Second Circuit was an endorsement and adoption of "the heightened pleading standard" which the Second Circuit has repeatedly done in direct challenge to the case precedents of this Court. In *Leatherman v. Tarrant County, Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 113 S. Ct. 1160, 122 L. Ed. 517 (1983) this Court prohibited the application of a heightened pleading standard in actions such as this action under 42 U.S.C. § 1983 alleging a violation of the plaintiffs rights to due process and equal protection of the law. In *Swerkowicz v. Sorema N.A.*, 534 U.S. 506 122 S. Ct. 992, 152 L. Ed. 2d 1 decided February 26, 2002, this Court revisited the heightened pleading standard, and the injustice it can produce, when applied with regard to a motion to dismiss in an employment discrimination and age discrimination law suit. In a cogent opinion, Justice Thomas examined the "McDonald-Douglas standard" that had been pronounced by the Court with regard to employment discrimination claims, and clearly

distinguished between that standard, which is an evidentiary standard of proof, and the standards of pleading. In reaffirming the simplified pleading standard of Federal Rules of Civil Procedure 8(a)(2) this Court reversed the judgment of the United States of the Court of Appeals for the Second Circuit and remanded for further proceedings.

In *Swierkiewicz*, Judge Presca of the United States District Court for the Southern District of New York had granted the employers motion to dismiss finding that the complaint did not adequately allege a *prima facie* case under the McDonald Douglas standard. In effect, the District Court had dismissed on the heightened pleading standard just as the District Court has done in this case. The Court of Appeals for the Second Circuit affirmed and certiorari was granted. In reversing the Court of Appeals, and remanding, this Court also abrogated one of the cases relied upon by Judge Hurley in his Decision and Order in this case insofar as it dismissed plaintiffs equal protection claims, namely *Tarshis v. Riese Organization*, 211 F.3d 30 (2d Cir. 2000). Furthermore, this Court noted that under the Second Circuit's heightened pleading standard a plaintiff would be required, without full time and opportunity to conduct discovery, to present direct evidence and specific evidentiary facts within a pleading before such discovery has been permitted, and despite the fact that discovery would unearth those facts, which in fact occurred in this matter. It is submitted that despite this Court's well reasoned decision and opinion in *Swierkiewicz*, the Court of Appeals proceeded to do exactly what it was reversed by this Court for doing in *Swierkiewicz*.

The Second Circuit stands in direct conflict not only with its own prior decisions and precedents, but with the controlling precedents, of the United States Courts of Appeal for the Third, Sixth and Tenth Circuits.

In *Eddy v. Virgin Island Water and Power Authority*, 256 F.3d 204 (3d Cir. 2001) the United States Court of Appeals for the Third Circuit recognized a constitutionally protected right of an employee, under substantive due process to be free from conduct by a governmental employer that shocked the conscience. In doing so, the Court of Appeals expressly considered the opinion of this Court in *Collins v. City of Harker Heights*, 502 U.S. 115, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992) and of the Second Circuit in *McClary v. O'Hare*, 786 F.2d 83 (2d Cir. 1986) and found that those cases do not support the proposition that in all cases the failure of an employer (municipal or otherwise) to provide a minimal level of safety and security in the workplace is not actionable. Rather, the Court of Appeals in *Eddy* properly reasoned and concluded that even under this Courts decision in *Collins* deliberate indifference of the employer to the decedents health and safety, which was and is arbitrary government action that shocks the conscience, is actionable. Of greater significance is the Third Circuits recognition of the constitutionally protected and actionable rights to health, safety and well being under such facts, the very claims asserted by the Petitioners in this action.

In *Upsher v. Grosse Pointe Public School System*, 285 F.3d 448 (6th Cir. 2002) (certiorari denied) the Court of Appeals for the Sixth Circuit expressly held that:

> We begin, therefore, by looking at how the plaintiffs describe the constitutional right at stake in their complaint. The plaintiffs allege that the defendants, in ordering the plaintiffs to remove the asbestos-containing materials, caused injury to the plaintiff which was "willful, wanton, malicious and demonstrated complete, utter and

> reckless disregard for their health and safety" in violation of Section 1983. In their appellate briefing, the plaintiffs clarify that their Section 1983 claim rests upon Section 1 of the Due Process Clause of the Fourteenth Amendment, specifically the substantive component that protects against deliberate decisions of government officials to deprive any person of life, liberty or property without due process of law". U.S. Const. Amend. XIV Section 1. We conclude that a fair reading of the plaintiffs complaint, unlike the complaint in *Collins* does allege a willful violation.

*Id.* at 451.

In *Sherwood v. Oklahoma County*, 42 Fed. Appx. 353, 2002 W.L. 1472197 (10th Cir. 2002) the Court of Appeals for the Tenth Circuit considered a fact pattern hardly distinguishable from the facts at bar. In *Sherwood*, the plaintiff, a supervisor at a prison facility, alleged that he suffered serious health problems as a result of being required to oversee prison inmates spray painting governmental vehicles in an area with no ventilation and no safety equipment. Plaintiff Sherwood brought a 1983 action against the county sheriff and other government representatives alleging that they were liable for abusing their power, and thereby violating a substantive due process rights by recklessly or intentionally exposing him to an unreasonable risk of harm. The United States District Court for the Western District of Oklahoma granted summary judgment for the defendants holding, as did Judge Hurley in this case, that the plaintiff failed to demonstrate a constitutional violation. In reversing and remanding, the Court of Appeals for the

Tenth Circuit held that the plaintiff had pled facts sufficient to allow the issue of whether the sheriffs conduct was egregious, outrageous and recklessly indifferent to serious health consequences imposed on plaintiff, and thus whether the sheriffs conduct violated plaintiffs substantive due process rights to go to the jury. The Court in *Sherwood* specifically went on to hold that government conduct which is arbitrary and conscience shocking in a constitutional sense can form the basis for a substantive due process claim even under *Collins*. The Petitioners in the case at bar have alleged their causes of action more than sufficiently and should be entitled to offer proof that the degree of outrageous conduct, and the magnitude of potential and actual harm is truly conscience shocking and actionable as a violation of both due process and equal protection of the law.

Not only is the Decision and Order of the District Court, and the affirmance by the Second Circuit, in direct conflict with the decisions and precedents in the Third, Sixth and Tenth Circuit but they are in contrast and conflict with the Second Circuits own opinions. In *LaBounty v. Coughlin*, 137 F.3d 68 (1998) the Second Circuit reversed the granting of summary judgment for the defendant correctional facility officials finding that summary judgment on the inmates tainted drinking water claim would be vacated to allow the District Court to determine whether officials responded properly to the inmates request for production of documents and, moreover, that the plaintiff inmates stated an Eighth Amendment deliberate indifference claim based on allegations that he was exposed to friable asbestos while incarcerated and that officials knowingly failed to protect him to such exposure.

In *McClary v. O'Hare*, 786 F.2d 83 (2d Cir. 1986), the Second Circuit recognized that harm caused by government employees to government employees by grossly neglect, reckless or intentional abuse of government authority, rather than ordinary negligence, would still be actionable under Section 1983. *Id.* at 88.

The Petitioners in this case been denied due process and equal protection of law by the Respondents. The Circuit Court opinion, conflicts with its own precedents, as well as the precedents of three other Circuits. The District Court, and the Court of Appeals have, in effect, violated the Respondents rights to due process and equal protection of the law by according greater protection to inmates as opposed to workers working in a required albeit tainted and environmentally hazardous workplace.

## REASONS FOR GRANTING THE WRIT

### I. THE COURT OF APPEALS FOR THE SECOND CIRCUIT ERRED IN AFFIRMING THE DISTRICT COURTS DECISION AND ORDER IN DISMISSING THE PETITIONERS DUE PROCESS AND EQUAL PROTECTION CLAIMS.

The provisions of Rule 10 of the Rules of the United States Supreme Court provide in relevant part as follows:

> Rule 10. Considerations Governing Review on Certiorari
>
> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling

reasons. The following, although neither controlling nor fully measuring the Courts discretion, indicate the character of the reasons the Court considers:

> (a) a United States Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> * * *
>
> (c) A state court or a United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

The District Court, and the Second Circuit Court of Appeals, have rendered decisions which stand in direct conflict with the decisions of not one (1), not two (2) but three (3) other United States Courts of Appeal, to wit, the Third, Sixth and Tenth Circuits, and of this Court, and failed to recognize the very constitutional and civil rights established, recognized and found actionable by those Courts.

The District Court, and the Second Circuit Court of Appeals, have undeniably departed from the accepted and usual course of proceedings in determining motions to dismiss under Rule 12(c) by applying the "heightened pleading standard", which is the substantial equivalent of a summary judgment standard without the benefit of full discovery. Evidence of this fact can be found in case law relied upon by the Second Circuit (*Knight v. Connecticut Department of Health*, 275 F.3d 156 (2001) a *summary judgment* case). This standard has been criticized and abrogated by this Court on at least two (2) separate occasions, namely, in *Leatherman v. Tarrant County, Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993), a 1983 action and more recently in *Swierkewicz v. Sorima, N.A.*, 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002), a case in which this Court *reversed* the Second Circuit Court of Appeals for doing exactly what it did in this case. The Second Circuits affirmance of the District Court sanctioned that same departure, and stands in conflict with the decisions of this Court.

The Second Circuit has decided an important question of federal law directly impacting significant due process and equal protection rights in both the governmental and non-governmental workplace , and has done so in a manner which fails to consider or apply the arbitrary "shock the conscience" standard of conduct recognized by the Court as actionable in *Collins v. City of Harker Heights*, 503 U.S. 115, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992). The granting of a writ of certiorari would allow this Court to settle the issue and resolve the conflict. While this Court, in *Collins*, rejected the notion that the due process clause imposes upon a municipality a duty to provide a minimum level of workplace

safety, it acknowledged that in a case, like the one at bar, involving arbitrary, conscience shocking conduct in a constitutional sense, the conduct could be actionable. The Court also recognized in *Collins* and accepted that a state statute regarding warnings as to noxious gases, and safety training created "an entitlement that qualifies as a liberty interest protected by the Due Process Clause." *Id.* at page 1070. Petitioners have sufficiently pled such a cause of action and must be allowed their day in Court.

Finally, the draconian application of the prohibited heightened pleading standard as visited upon the Petitioners by the District Court and the Second Circuit, has denied them their day in Court with regard to a set of facts giving use to a special duty, and with respect to a state created danger. Despite a legally sufficient complaint, they have been summarily denied an opportunity to offer proof simply because the courts below failed to recognize what this Court, and three (3) other Circuits have recognized, namely, that these Petitioners possess life and liberty interests protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment from arbitrary, conscience shocking conduct, by government employers and other municipal actors.

## CONCLUSION

THEREFORE, Petitioners, MURRAY, BRENNAN MARKFELDER and CHRISTIANSEN, request this Court to GRANT their Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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*Attorneys for Petitioners*

# APPENDIX

## APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED DECEMBER 16, 2002

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

02-7228

**SUMMARY ORDER**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 16th day of December, two thousand and two.

JOHN MURRAY, DIANE MURRAY, RICHARD MARKFELDER, VAGN CHRISTIANSEN and MAUREEN CHRISTIANSEN,

*Plaintiffs-Appellants*,

JOHN DOE and JANE DOE, being fictitious names intended to refer to other and additional potential party plaintiffs to be named and joined as plaintiffs to this litigation,

*Plaintiffs*,

- v.-

CONNETQUOT CENTRAL SCHOOL DISTRICT OF ISLIP, JOSEPH LARIA, Dr., individually and as Superintendent of the Connetquot Central School District of Islip, ANTHONY J. PECORALE, Dr., individually and as Former Super-

intendent of the Connequot Central School District of Islip, JOHN MALONEY, individually and as Former Superintendent of the Connequot Central School District of Islip, COUNTY OF SUFFOLK, COUNTY OF SUFFOLK DEPARTMENT OF HEALTH SERVICES, DR. CLARE B. BRADLEY, individually and as Commissioner of the Suffolk County Department of Health Services and DR. MARY HIBBERD, individually and as former Commissioner of the Suffolk County Department of Health Services,

*Defendants-Appellees.*

Appeal from the United States District Court for the Eastern District of New York (Hurley, J.).

**UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that the judgment of the district court be, and it hereby is **VACATED IN PART** with the instruction to dismiss without prejudice as to John Murray and Richard Markfelder, who are deceased, and **AFFIRMED** in all other respects.

An appeal on behalf of John Murray, Diane Murray, Richard Markfelder, Vagn Christiansen, and Maureen Christiansen is taken from a judgment entered on February 6, 2002, in the United States District Court for the Eastern District of New York (Hurley, J.), dismissing this suit on the pleadings pursuant to Fed.R.Civ.P. 12(c). The male plaintiffs were employed at various times as either bus mechanics or bus drivers at the Connetquot School District's bus garage in Bohemia, NY, where they were allegedly exposed to toxic substances. Citing 42 U.S.C. § 1983, plaintiffs alleged

violations of due process and equal protection by reason of the Connetquot defendants' knowing exposure of plaintiffs to carcinogens and their deliberate indifference to the plaintiffs' safety, and by the Suffolk County defendants' awareness of the hazardous conditions and their failure to compel the Connetquot defendants to remedy those conditions.[1] On appeal, plaintiffs challenge the district court's holding that they failed to allege a valid § 1983 claim.

This Court reviews *de novo* a district court's grant of a motion for judgment on the pleadings pursuant to Rule 12(c). *Burnette v. Carothers*, 192 F.3d 52, 56 (2d Cir. 1999). "In deciding a Rule 12(c) motion, we apply the same standard as that applicable to a motion under Rule 12(b)(6), accepting the allegations contained in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party." *Id.*

We agree with the district court that plaintiffs failed to state a § 1983 claim because they did not allege the deprivation of a legally cognizable constitutional right. *See Dwares v. City of New York*, 985 F.2d 94, 98 (2d Cir. 1993). The complaint, fairly read, premises the due process claim on a denial of a minimal level of workplace safety in public employment, or on defendants' deliberate indifference to plaintiffs' safety. Neither allegation is viable under § 1983, *see Collins v. City of Harker Heights*, 503 U.S. 115, 127-130 (1992), and we adhere to its holding today.

---

1. The plaintiffs also brought state law claims, over which the district court declined to exercise supplemental jurisdiction.

Plaintiffs' equal protection claim is likewise meritless: "To show an equal protection violation, appellants must show that they were selectively treated compared with similarly situated employees, and that selective treatment was based on impermissible considerations. . . ." *Knight v. Conn. Dep't of Pub. Health*, 275 F.3d 156, 166 (2d Cir. 2001) (internal quotation mark omitted). At most, plaintiffs suggest that they were discriminated against as municipal employees, **Blue 26**, but they do not allege how others "similarly situated" were subject to different treatment, or what "impermissible consideration" motivated the selective treatment.

We have reviewed plaintiffs' other contentions and find no merit in them.

The record discloses that John Murray and Richard Markfelder are now deceased. A § 1983 claim survives death "if applicable state law creates a right of survival." *Barrett v. United States*, 689 F.2d 324, 331 (2d Cir. 1982). "Under New York law the claim arising from the infringement of [plaintiff's] civil rights survives his death and may be asserted by his personal representative." *Id.* Even if death occurs between the filing of the suit and the time of the appeal, a personal representative still must be substituted. *See Johnson v. Morgenthau*, 160 F.3d 897, 898-99 (2d Cir. 1998) (per curiam). No personal representative has been substituted for either John Murray or Richard Markfelder. Their claims are therefore dismissed without prejudice.

*Appendix A*

For the foregoing reasons, the judgment of the district court is the judgment of the district court is **VACATED IN PART** with the instruction to dismiss without prejudice as to John Murray and Richard Markfelder, who are deceased, and **AFFIRMED** in all other respects.

FOR THE COURT:
Roseann B. MacKechnie, Clerk of Court

BY: _____

**APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED AND FILED FEBRUARY 6, 2002**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 00-5433 (DRH)

JOHN MURRAY and DIANE MURRAY, RICHARD MARKFELDER, VAGN CHRISTIANSEN, and MAUREEN CHRISTIANSEN, and JOHN DOE and JANE DOE,

Plaintiffs,

-against-

CONNETQUOT CENTRAL SCHOOL DISTRICT OF ISLIP, DR. JOSEPH LARIA, Individually and as Superintendent of the Connetquot Central School District of Islip, DR. ANTHONY J. PECORALE, Individually and as the former Superintendent of the Connetquot Central School District of Islip, JOHN MALONEY, Individually and as the former Superintendent of the Connetquot Central School District of Islip, COUNTY OF SUFFOLK, SUFFOLK COUNTY DEPARTMENT OF HEALTH SERVICES, DR. CLARE B. BRADLEY, Individually and as Commissioner of the Suffolk County Department of Health Services, and DR. MARY HIBBERD, Individually and as former Commissioner of the Suffolk County Department of Health Services,

Defendants.

*Appendix B*

JUDGMENT

A Memorandum of Decision and Order of Hon. Denis R. Hurley, United States District Judge, having been filed on January 29, 2002, granting the motions by the District and County defendant's for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c); and denying as moot the cross-motions by plaintiffs' to file a second amended complaint and late demand for a jury trial; remanding the case to the Supreme Court, Suffolk County; and directing the Clerk of Court to transfer the case file to the Clerk of the Supreme Court, Suffolk County, it is

ORDERED AND ADJUDGED that plaintiffs take nothing of defendants; that the motions by the District and County defendants for judgment on the pleadings are granted; that cross-motions by plaintiff's to file a second amended complaint and late demand for a jury are denied as moot; and that the case is remanded to the Supreme Court, Suffolk County.

Dated: Central Islip, New York
February 6, 2002

ROBERT C. HEINEMANN
Clerk of the Court

By: [illegible]
Deputy Clerk

**APPENDIX C — MEMORANDUM OF DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED JANUARY 29, 2002 AND FILED JANUARY 30, 2002**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

00-CV-5433 (DRH)(ARL)

JOHN MURRAY and DIANE MURRAY; RICHARD MARKFELDER; VAGN CHRISTIANSEN and MAUREEN CHRISTIANSEN; and JOHN DOE and JANE DOE,

Plaintiffs,

-v.-

CONNETQUOT CENTRAL SCHOOL DISTRICT OF ISLIP; DR. JOSEPH LARIA, Individually and as Superintendent of the Connetquot Central School District of Islip; DR. ANTHONY J. PECORALE, Individually and as the former Superintendent of the Connetquot Central School District of Islip; JOHN MALONEY, Individually and as the former Superintendent of the Connetquot Central School District of Islip; COUNTY OF SUFFOLK; SUFFOLK COUNTY DEPARTMENT OF HEALTH SERVICES; DR. CLARE B. BRADLEY, Individually and as Commissioner of the Suffolk County Department of Health Services; and DR. MARY HIBBERD, Individually and as former Commissioner of the Suffolk County Department of Health Services,

Defendants.

*Appendix C*

## MEMORANDUM OF DECISION AND ORDER

**HURLEY, District Judge:**

In this action, the Plaintiffs, former employees of the Connetquot Central School District, ("the District") and their spouses, allege that the Defendants violated their civil rights by exposing them to toxic substances in their workplace and failing to warn or protect them from such substances. Presently before the Court are the Defendants' motions for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c), and the Plaintiffs' motion to amend the complaint.

### *BACKGROUND*

According to the amended complaint, Plaintiffs John Murray, Richard Markfelder, and Vagn Christiansen were employed at the District's bus garage in Bohemia, N.Y. They claim that they were exposed to "certain environmentally hazardous and dangerous chemicals and toxic substances" at the garage, and that the District deliberately failed to advise them of the existence and dangerousness of such substances.

The Plaintiffs allege claims under 42 U.S.C. § 1983, claiming violations of their due process and equal protection rights under the 14th Amendment and the New York State Constitution. In addition, the amended complaint invokes the regulations of the United States Department of Labor implementing the Occupational Safety and Health Act ("OSHA"). 29 C.F.R. 1910.0, the County of Suffolk Health and Sanitation Code, and various other state laws and regulations. Such claims are asserted against the District

itself, its present and former Superintendents, as well as against the County of Suffolk and the Suffolk County Health Department and its present and former Commissioners, whom the Plaintiffs allege failed to enforce the provisions of the OSHA regulations and the Suffolk County Health Code. In addition, each male Plaintiff alleges claims of negligence and breach of employment contract, and the spouses of Murray and Christiansen allege claims for loss of consortium.

## *DISCUSSION*

As in a motion under Rule 12(b), a court ruling on a motion under Rule 12(c) is to look only to the allegations of the complaint and any documents attached to or incorporated by reference in the complaint, *Newman & Schwartz v. Asplundh Tree Expert Co.*, 102 F.3d 660, 662 (2d Cir. 1996); to assume all well-pleaded factual allegations to be true; and to view all reasonable inferences that can be drawn from such allegations and documents in the light most favorable to the plaintiff. *Burnette v. Carothers*, 192 F.3d 52, 56 (2d Cir. 1999); *Dangler v. New York City Off Track Betting Corp.*, 193 F.3d 130 (2d Cir. 1999). The issue to be considered by the Court is not whether a plaintiff will ultimately prevail, but merely whether the claimant is entitled to offer evidence to support the claims. *Id., citing Villager Pond, Inc. v. Town of Darien*, 56 F.3d 375, 378 (2d Cir. 1995).

*Appendix C*

**A. The due process claims**

The Defendants first claim that the Plaintiffs fail to state a claim for a violation of due process under 42 U.S.C. § 1983. The Plaintiffs' complaint, permeated by redundant verbiage and synonyms,[1] does not describe the due process with any degree of specificity, instead alleging, for example, that the Defendants "violated, willfully violated, and maliciously violated said plaintiffs civil and constitutional rights as guaranteed and protected by the Fourteenth Amendment of the Constitution of the United States, and the Due Process and Equal Protection clauses and protections set forth therein . . ., said actions were the result of the denial of substantive due process to the plaintiffs, selective denial of due process and equal protection to the plaintiffs. . . ."

A plaintiff alleging a due process claim must first show that he was deprived of life, liberty, or property at the hands of the State. *McMenemy v. City of Rochester*, 241 F.3d 279, 286-87 (2d Cir. 2001); *Bernheim v. Litt*, 79 F.3d 318, 322 (2d Cir. 1996). The due process clause does not create the property rights it protects; rather, such rights must be created and defined by existing sources such as state law. *McMenemy*, 241 F.3d at 287, *citing Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

---

1. By way of example, Paragraph 30 of the amended complaint is a single sentence, yet it is more than a page in length, and contains more than 400 words and approximately 50 commas. By contrast, Paragraphs 16-23 repeat the identical 75-word paragraph, changing only a single operative verb in each iteration so as to allege that the District "owned" the bus garage (Paragraph 16), "operated" the bus garage (Paragraph 17), "managed" the bus garage (Paragraph 18), "maintained" the bus garage (Paragraph 19), and so on.

*Appendix C*

The Plaintiffs do not specifically allege the specific rights they claim were denied to them without due process. Variously, the Plaintiffs allege that the Defendants' acts deprived them of "the lawful protection and pursuit of their personal and property rights and interests, their life and liberty rights and interest, including equal access to their careers and employment opportunities in a non-hazardous safe work environment, the right to enter upon the CONNETQUOT defendants (sic) premises, separate and apart for (sic) any employment relationship without exposure to hazardous and unsafe conditions, the right to full, complete and equal application and enforcement and protection of the Federal, State and local statutes, laws, ordinances, rules, and regulations. . . ." Distilling this to its essence, it appears to the Court that the Plaintiffs primarily allege the denial of a right to a safe workplace.

The Supreme Court has unambiguously established that there is no federal constitutional right to a minimal level of safety in the workplace. *Collins v. City of Harker Heights*, 503 U.S. 115, 127-130 (1992) ("the Due Process Clause does not impose an independent federal obligation upon municipalities to provide certain minimal levels of safety and security in the workplace"). In *Collins*, the plaintiff's husband was asphyxiated while working at his job in the defendant's sewer system. The plaintiff commenced a § 1983 action against the city, alleging that it had denied her husband due process by failing to warn him of particular hazards incident to the tasks he was assigned. In dismissing the plaintiff's claims, the Supreme Court observed that

> We also are not persuaded that the city's alleged failure to train its employees, or to warn them about known risks of harm, was an omission that can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense. Petitioner's claim is analogous to a fairly typical state-law tort claim: The city breached its duty of care to her husband by failing to provide a safe work environment. Because the Due Process Clause does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society, we have previously rejected claims that the Due Process Clause should be interpreted to impose federal duties that are analogous to those traditionally imposed by state tort law.

503 U.S. at 128 (internal quotes and citations omitted). That precise analysis applies with equal force here, and compels the dismissal of the Plaintiffs' due process claims.

Just as the Plaintiffs do here, the plaintiff in *Collins* also sought refuge in alleging a due process violation arising from the defendant's failure to comply with reporting requirements imposed by workplace health and safety laws. *See* 503 U.S. at 129 ("we reject petitioner's suggestion that the Texas Hazard Communication Act supports her substantive due process claim") (footnote omitted). For the reasons stated in *Collins*, this Court dismisses the Plaintiffs' due process claims premised on the OSHA regulations.

*Appendix C*

The Plaintiffs insist that their claim is not merely that the Defendants failed to provide a safe workplace, but rather that the Defendants somehow restrained the Plaintiffs from acting to protect themselves, thus assuming a "special duty" towards them. In this regard, the Plaintiffs rely on cases such as *DeShaney v. Winnebago County Dept. of Social Svcs.*, 489 U.S. 189, 197 (1989) and *Citizen's Accord v. Town of Rochester*, 2000 WL 504132 (N.D.N.Y. 2000). However, the Court in *DeShaney* limited the application of the "special duty" theory, finding that it is only "that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." 489 U.S. at 199-200. Similarly, in *Citizen's Accord*, the court observed that "in the ordinary case, such a special relationship arises where a state actor has restrained an individuals personal liberty." 2000 WL 504132 at *18. Clearly, there is no allegation here that the Defendants somehow restrained the Plaintiffs' liberty as it would a prisoner. Even assuming the Plaintiffs made such an argument, the Supreme Court in *Collins* specifically rejected the application of such a doctrine to employees of a municipality. *See Collins*, 503 U.S. at 128 ("Petitioner cannot maintain, however, that the city deprived Collins of his liberty when it made, and he voluntarily accepted, an offer of employment.")

The Plaintiffs also argue that the Defendants are liable under a second theory suggested in *DeShaney*, namely that the Defendants are responsible for the Plaintiffs' safety because the State created the danger the Plaintiffs were exposed to. In *DeShaney*, in which the defendant released a child from foster care into the custody of his father knowing

that the child was at risk of being beaten by the father, the Court held that "[w]hile the State may have been aware of the dangers that [the child] faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them." 499 U.S. at 201. The Second Circuit, subsequently facing a case in which the police allegedly collaborated with third parties to permit the third parties to beat flag-burning protesters, drew upon the *DeShaney* rationale to find that the police could be held liable for the beatings under the due process clause because, by condoning the third parties' violence, they affirmatively acted to place the protestors in a more vulnerable position than they otherwise might have been. *Dwares v. City of New York*, 985 F.2d 94, 98-99 (2d Cir. 1993).

However, the "state created dander" theory does not simply create an independent due process cause of action anytime the state does something that subjects a plaintiff to a risk of harm. Pursuing that logic to its conclusion would result in the state being subject to due process claims for every improperly timed traffic light and every slippery floor in the county office building. Rather, the doctrine merely serves as a way to impose liability on a public actor for a due process violation accomplished through a private actor. *See e.g. Dwares*, 985 F.2d at 98 ("a state actor may be subject to liability for an action physically undertaken by private actors in violation of the plaintiffs' liberty or property rights if the state actor directed or aided and abetted the violation"); *Estate of Rosenbaum v. City of New York*, 975 F.Supp. 206, 218 (E.D.N.Y. 1997) ("state involvement in the *private wrong* implicates the Fourteenth Amendment") (emphasis added). A necessary predicate to invoking the "state created danger"

doctrine is a showing that the plaintiff was deprived of a liberty or property interest without due process; once it is shown that a private actor deprived the plaintiff of liberty or property, the "state created danger" doctrine can be used to extend due process liability for that deprivation to a state actor. *See e.g. Dwares*, 985 F.2d at 98 ("[t]here is no question that a physical beating by one who has no privilege of inflicting such corporeal punishment intrudes on the victim's liberty interests").

Here, as discussed above, the Plaintiffs cannot show a valid liberty or property interest that was allegedly violated, as there is no constitutional entitlement to a safe workplace. Interpreting the "state created danger" doctrine to create an alternative basis for liability would repudiate the very reasoning of the Supreme Court in *Collins*. If there can be no liability in *Collins* for the state's failure to warn employees of a known danger existing in the sewers, it defies logic to contend that the Plaintiffs here can hold the District liable for failing to warn them of a known danger existing in the bus garage.

Accordingly, the Plaintiffs have failed to allege a valid § 1983 claim sounding in denial of due process.

**B. Equal Protection**

The Plaintiffs also allege claims under § 1983 for violation of the equal protection clause. An equal protection claim requires proof that the state treated the plaintiffs differently from others similarly situated and that such disparate treatment was the result of impermissible discrimi-

nation. *Knight v. Conn. Dept. of Public Health*, 2001 WL 1580134 (2d Cir. 2001); *Muller v. Costello*, 187 F.3d 298, 309 (2d Cir. 1999). To establish an equal protection violation, plaintiff must show purposeful discrimination directed to an identifiable class. *Giano v. Senkowski*, 54 F.3d 1050, 1057 (2d Cir. 1995). Alternatively, an equal protection claim may lie pursuant to an allegation of selective treatment in terms of public employment where it is shown that such treatment was motivated by an intention to discriminate on the basis of impermissible considerations, such as race or religion, to punish or inhibit the exercise of constitutional rights, or by a malicious or bad faith intent to injure the person. *Crowley v. Courville*, 76 F.3d 47, 52-53 (2d Cir. 1996); *Zahra v. Town of Southold*, 48 F.3d 674, 683 (2d Cir. 1995).

The Plaintiffs do not identify other persons whom they allege to be similarly situated to them, but who were not subjected to the same treatment by the Defendants. For example, the Plaintiffs do not allege that the County Defendants were more diligent in testing and reporting environmental hazards in other school districts, or that other District employees were given more comprehensive notice of workplace hazards. Even assuming, however, that the Plaintiffs were subjected to unequal treatment, the complaint alleges no facts sufficient to warrant an inference that such treatment was the result of impermissible discrimination, retaliation, or malice. While the amended complaint contains verbiage accusing the Defendants of "intentionally violating, wilfully disregarding and/or thereby negligently, recklessly, intentionally and willfully and maliciously violating [the Plaintiffs') rights " the 75-page amended complaint contains absolutely no facts to support such conclusory allegations.

*Young v. City of Mount Ranier*, 238 F.3d 567, 577 (4th Cir. 2001) ("the original complaint throws in words and phrases such as 'deliberate indifference,' 'malicious,' 'outrageous,' and 'wanton' when describing the conduct of the officers. The presence, however, of a few conclusory legal terms does not insulate a complaint from dismissal under Rule 12(b)(6)."); *Tarshis v. The Reise Organization*, 211 F.3d 30, 35 (2d Cir. 2000) ("bald assertions and conclusions of law will not suffice to state a claim"); *Leeds v. Meltz*, 85 F.3d 51, 53 (2d Cir. 1996). Indeed, other than the conclusory allegations of knowledge by the District, nothing in the amended complaint indicates that the District was ever aware of the environmental hazards at the bus garage at any time.

Accordingly, the Plaintiffs fail to state equal protection claims under § 1983. The Defendants motion to dismiss the § 1983 claims is therefore granted.

The dismissal of the Plaintiffs' first cause of action terminates any potential federal claims by the Plaintiffs. Given that the remaining claims appear to be garden-variety "toxic tort" causes of action commonly pursued in state court; the public character of both the District and County Defendants; and the fact that this litigation is still at an early stage, this Court concludes that exercising supplemental jurisdiction over the remaining state law claims is not warranted. *Mauro v. Southern New England Telecommunications Inc.*, 208 F.3d 384, 388 (2d Cir. 2000); *Marcus v. AT&T Corp.*, 138 F.3d 46, 57 (2d Cir. 1998).

*Appendix C*

**C. Motion to amend**

The Plaintiffs cross-move to file an amended complaint and to serve a late notice of a demand for trial by jury. According to the Plaintiffs, the only claims sought to be added by way of amendment involve claims for wrongful death and conscious pain and suffering on behalf of Plaintiff Markfelder. Because the decision to grant or deny such amendment would not affect the lack of federal jurisdiction, this Court need not decide those motions.

***CONCLUSION***

For the foregoing reasons, the motions by the District and County Defendants for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) are GRANTED. The cross-motions by Plaintiffs to file a second amended complaint and late demand for a jury trial are DENIED AS MOOT.

There being no continued basis for federal jurisdiction, the case is remanded to the Supreme Court, Suffolk County for all further disposition pursuant to 28 U.S.C. § 1447(c). The Clerk of the Court is directed to transfer the case file to the Clerk of the Supreme Court, Suffolk County, and to close this case.

**SO ORDERED.**

Dated: Central Islip, N.Y.
January 29, 2002

s/ Denis R. Hurley
Denis R. Hurley,
United States District Judge

**APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED FEBRUARY 11, 2003**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURTHOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 11th Day of February, two thousand three.

**Docket No. 02-7228**

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JOHN MURRAY, DIANE MURRAY, RICHARD MARKFELDER, VAGN CHRISTIANSEN and MAUREEN CHRISTIANSEN,

Plaintiffs-Appellants,

JOHN DOE and JANE DOE, being fictitious names intended to refer to other and additional potential party plaintiffs to be named and joined as plaintiffs to this litigation,

Plaintiffs,

v.

*Appendix D*

CONNETQUOT CENTRAL SCHOOL DISTRICT OF ISLIP, JOSEPH LARIA, Dr., individually and as Superintendent of the Connetquot Central School District of Islip, ANTHONY J. PECORALE, Dr., individually and as Former Superintendent of the Connetquot Central School District of Islip, JOHN MALONEY, individually and as Former Superintendent of the Connetquot Central School District of Islip, COUNTY OF SUFFOLK, COUNTY OF SUFFOLK DEPARTMENT OF HEALTH SERVICES, DR. CLARE B. BRADLEY, individually and as Commissioner of the Suffolk County Department of Health Services and DR. MARY HIBBERD, individually and as former Commissioner of the Suffolk County Department of Health Services,

Defendants-Appellees.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by appellants, John Murray, Diane Murray, Richard Markfelder, Vagn Christiansen and Maureen Christiansen,

> Upon consideration by the panel that decided the appeal, it is ordered that said petition for rehearing is **DENIED.**

It is further noted that the petitions for rehearing en banc have been transmitted to the judges for the Court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

*Appendix D*

**FOR THE COURT**
ROSEANN B. MACKECHNIE

By: s/ Arthur Heller
Arthur Heller,
Administrative Attorney

Supreme Court, U.S.
FILED
JUN 13 2003
OFFICE OF THE CLERK

No. 02-1663

IN THE

# Supreme Court of the United States

DIANE MURRAY, Executrix of the Estate of JOHN MURRAY, Deceased, *et al.*,

*Petitioners*,

*v.*

CONNETQUOT CENTRAL SCHOOL DISTRICT OF ISLIP, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF IN OPPOSITION FOR CONNETQUOT RESPONDENTS

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Respondents, Connetquot Central School District of Islip, Dr. Joseph Laria, Dr. Anthony J. Pecorale, and John Maloney ("Connetquot defendants"), request the Petition for a Writ of Certiorari ("Pet.") filed by Diane Murray, individually and as nominated executrix of the estate of John Murray, seeking review of the decision of the United States Court of Appeals for the Second Circuit entered in this case on December 16, 2002 be denied.

## COUNTER STATEMENT OF THE CASE

Petitioners seek recovery under 42 U.S.C. § 1983 for alleged violation of their right to equal protection and due process of law as guaranteed by the Fourteenth Amendment. Petitioners assert the Connetquot defendants violated their constitutional rights by deliberately or negligently introducing toxic substances into the working environment.

The action was commenced in Supreme Court, Suffolk County on or about August 3, 2000. The Respondents jointly removed the case from Supreme Court to the United States District Court, Eastern District of New York, on September 11, 2000.

After the close of pleadings under the District Court's Scheduling Order, all Respondents moved for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. By Memorandum Decision and Order of January 29, 2002 (Pet. App. at 8a), Judge Denis R. Hurley granted the Respondents' motions for judgment on the pleadings dismissing Petitioners' federal law claims and remanding the remaining State Law claims to Supreme Court, Suffolk County. On appeal, the United States Court of Appeals for the Second Circuit agreed with Judge Hurley's decision, finding the Petitioners had failed to allege valid due process or equal protection claims under Section 1983.

In a transparent attempt to grab the Court's attention, Petitioners now point to three federal court of appeals cases they claim conflict with the Second Circuit's holding below. In addition, Petitioners allege the District Court and Court of Appeals applied a heightened pleading standard. Further, Petitioners allude to allegations not appearing in the complaint to support their claims. (Pet. 6-7). A thorough analysis, however, will demonstrate that no actual conflict exists among the Circuit Courts and that no heightened pleading standard was employed. Rather, petitioners' complaint simply failed to allege a constitutional due process or equal protection violation under the standards enunciated by this Court.

## REASONS FOR DENYING THE PETITION

### I. THE DECISION BELOW DOES NOT PRESENT A CONFLICT

The amended complaint fails to give "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). In reviewing the sufficiency of a complaint, "the issue is not whether a plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). Here, Petitioners simply neglected to allege the deprivation of a legally cognizable constitutional right, precluding any entitlement to offer evidence. (Pet. App. at 3a).

To state a viable cause of action under 42 U.S.C. § 1983, a plaintiff must allege that: (1) they were deprived of a right, privilege, or immunity secured by the federal Constitution or law of the United States; and (2) the deprivation was caused by a person while acting under the color of state law. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). The threshold issue is

whether plaintiffs' harm was caused by a constitutional violation. *See Collins v. City of Harker Heights*, 503 U.S. 115, 120 (1992). The first prong therefore necessarily requires an identification of the right, privilege, or immunity whose deprivation is alleged. *Id.* at 125.

In *Collins*, this Court concluded the legal standard for determining whether there has been a denial of substantive due process is whether the conduct is "arbitrary" or "conscience shocking" in a constitutional sense. 503 U.S. at 128. Considering allegations almost identical to those in the instant matter, the Court rejected Collins' two theories of recovery: "that the Federal Constitution imposes a duty on the city to provide its employees with minimal levels of safety and security in the workplace, or that the city's 'deliberate indifference' to Collins' safety was arbitrary action that must 'shock the conscience' of federal judges" *Id.* at 126. *Collins* involved alleged unsafe working conditions that caused the death of a municipal worker who entered a sewer without adequate ventilation. *Id.* at 117.

Those facts are significant for two reasons. First, until the decision in *Collins*, this Court had left open the question of what type of conduct would be sufficient to trigger the protections of the Due Process Clause with respect to people who are enjoying unrestricted liberty. *See Whitley v. Albers*, 475 U.S. 312, 327 (1986) and *Daniels v. Williams*, 474 U.S. 327, 334 n.3 (1986). This Court addressed for the first time the substantive due process rights of an individual enjoying unrestricted liberty. 503 U.S. at 123, 127.

Second, and equally important, is the fact the *Collins* decision involved a claim based upon an alleged creation of danger by state action (or inaction). *Id.* at 126. Thus, a claim for a deprivation of the substantive component of the Due Process

Clause by a person enjoying unrestricted liberty based upon a creation of danger theory should be governed, if at all, by whether the state action was "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Sacremento v. Lewis*, 523 U.S. 833, 847 n.8 (1998).

Like the Petitioners here, the petitioner in *Collins* failed to adequately describe the constitutional right at stake, namely a willful violation of Collin's rights. *Collins*, 503 U.S. at 125. ("[S]he does not even allege that his supervisor instructed him to go into the sewer when the supervisor knew or should have known that there was a significant risk that he would be injured."). Similarly, Petitioners failed to identify any actions of the Connetquot defendants' that deprived them of a constitutional right. "[T]he 75-page amended complaint contains absolutely no facts to support [its] conclusory allegations." (Pet. App. at 17a).

As Judge Hurley noted, "The Plaintiffs' complaint, permeated by redundant verbiage and synonyms, does not describe the due process with any degree of specificity . . . the Plaintiffs do not specifically allege the specific rights they claim were denied to them without due process" (Pet. App. at 11a-12a). The District Court also found plaintiffs failed to allege that the District was ever aware of the environmental hazards at the bus garage at any time. (Pet. App. at 18a). The Second Circuit affirmed, noting "plaintiffs failed to state a § 1983 claim because they did not allege deprivation of a legally cognizable constitutional right." (Pet. App. at 3a).

Petitioners cite to three summary judgment cases is support of their argument. *Eddy v. Virgin Islands Water and Power Authority*, 256 F.3d 204 (3d Cir. 2001); *Upsher v. Grosse Pointe Public School System*, 285 F.3d 448 (6th Cir. 2002),

*cert. denied*, __ U.S. __, 123 S. Ct. 88 (2002); *Sherwood v. Oklahoma County*, 42 Fed. Appx. 353, 2002 WL 1472197 (10th Cir. 2002), *cert. dismissed*, __ U.S. __, 2003 WL 21121073 (2003). These cases are readily distinguishable from the instant matter, both procedurally and substantively. Rather, the issues in this matter have previously been decided by this Court in *Collins*, 503 U.S. 115 (1992).

Neither the summary judgment cases cited by petitioners nor the Second Circuit's decision here are in conflict with the holding in *Collins*. Plaintiff claimed a violation of his rights under Section 1983 as well as several tort-based claims in *Eddy v. Virgin Islands Water and Power Authority*, 256 F.3d 204 (3d Cir. 2001). Plaintiff alleged that the defendant and its employees knew that he would face a risk of almost certain injury if he performed the work on the live voltage power line. *See Eddy v. Virgin Islands Water and Power Authority*, 955 F. Supp. 468, 474 (D. V.I. 1997). Additionally, plaintiff alleged he was threatened with disciplinary action if he refused to perform the required work. *Id.* Defendants' motion for summary judgment on the basis of qualified immunity was denied by the District Court and subsequently appealed to the Court of Appeals.

In analyzing the case to determine whether the defense of qualified immunity applied, The Third Circuit distinguished that case from *Collins* by noting that Eddy asserted "the substantive due process right to be free from conduct by a governmental employer that shocks the conscience." *Eddy*, 256 F.3d at 211. In contrast, Collins did not allege that the city had any specific intent to harm her husband, or even that city officials knew there was significant risk that he would be injured. *Collins*, 503 U.S. at 125; *Eddy*, 256 F.3d at 212 ("[W]e understand *Collins* to mean that the allegations in that case did not rise to the conscience-shocking level. . . .") Eddy, however, alleged that defendant's

conduct shocked the conscience and, therefore, alleged a violation of a clearly established constitutional right. *Eddy*, 256 F.3d at 213.

Again, the District Court and, by its affirmance, the Court of Appeals, found Eddy had adequately pled a constitutional violation. ("[H]e does allege that they were virtually certain that he would suffer injury . . . The factual allegations presented by Mr. Eddy . . . are sufficient to shock the conscience of this Court.") *Eddy*, 955 F. Supp. at 475. In stark contrast, the Complaint herein makes no factual allegations at all. This deficiency is fatal to Petitioners' claims since it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

In *Upsher v. Grosse Pointe Public School System*, 285 F.3d 448 (6th Cir. 2002), *cert. denied*, __ U.S. __, 123 S. Ct. 88 (2002), plaintiffs filed a claim alleging, *inter alia*, civil rights violations under 42 U.S.C. § 1983 related to an asbestos issue at a public school. *Id.* at 449-50. Defendants were informed that underlying floor tiles containing asbestos might be disturbed by machines that remove old carpet from the floors. The school ordered its custodians to remove the carpet nevertheless, without providing dust-removing air vacuums, protective clothing or respirators. Although the Sixth Circuit held a "fair reading" of the complaint alleged a willful violation of the Due Process Clause, the evidentiary record did not suggest that defendants deliberately decided to inflict pain or bodily injury on the plaintiffs. *Upsher*, 285 F.3d at 453. "[P]laintiffs' evidence establishes, at best, a case sounding in negligence and not a constitutional tort under § 1983." *Id.* at 454.

The Circuit Court's examination of the complaint in *Upsher* indicated that a constitutional violation was adequately alleged. *Upsher*, 285 F.3d at 452 ("The plaintiffs allege that the defendants, in ordering the plaintiffs to remove the asbestos-containing material, caused injury. . . ."). Nevertheless, based on the lack of evidence suggesting a constitutional tort, the Sixth Circuit dismissed the Section 1983 action. In contrast, petitioners herein presented nothing other than conclusory allegations regarding the Connetquot defendants' actions. This deficiency in pleading any facts to support their claims properly led to dismissal by the District Court, and affirmance of that dismissal by the Second Circuit.

In *Sherwood v. Oklahoma County*, 42 Fed. Appx. 353, 2002 WL 1472197 (10th Cir. 2002), defendants were ordered by the local Health and Safety Department to shut down their vehicle painting operation, which was improperly ventilated. Defendants then directed plaintiff to paint the vehicles using hazardous paint in a make-shift paint booth, also without adequate equipment or ventilation. Furthermore, plaintiff was threatened with termination if he refused to complete the painting process. The Tenth Circuit considered the factual question of whether defendants' actions were sufficient to meet the "shock the contemporary conscience" standard applied to substantive due process claims. *Id.* at 355. The court held the facts pled presented a jury question as to defendants' actions ("[A] reasonable jury could find Defendants' behavior was egregious, outrageous and recklessly indifferent to the serious consequences imposed on Plaintiff."). *Sherwood*, 42 Fed. Appx. at 360.

Here, there are no analogous facts pled by petitioners. "[T]he 75-page amended complaint contains absolutely no facts to support [its] conclusory allegations." (Pet. App. at 17a).

Not only did plaintiffs fail to identify the constitutional right they claim to have been violated, they failed to plead any facts regarding the Connetquot defendants actions.

Like the complaint itself, the first two questions presented by Petitioner are unnecessarily verbose and conclusory. However, this Court has previously answered both these questions. As in *Collins*, a bald allegation of "deliberate indifference" in a municipal workplace safety case is insufficient to impart Section 1983 liability. To prevent dismissal of a workplace safety claim based on a constitutional violation, at a minimum a petitioner must describe the constitutional right at stake and the actions taken by the defendants to deprive him of that right. *Collins*, 503 U.S. at 125. Here, Petitioners failed to describe either.

To be actionable under the standard announced in *Collins*, the action taken by a municipality must be "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *See Sacremento v. Lewis*, 523 U.S. 833 (1998). The Third, Sixth and Tenth Circuits uniformly applied this standard in the cases noted above. Here, the Second Circuit had no occasion to reach the issues considered by its sister courts (*i.e.* whether defendants alleged actions "shock the conscience") because Petitioners' complaint failed to describe the constitutional right at stake and what actions were taken by the Respondents to deprive them of that right, as required under *Collins*.

## II. THE COMPLAINT FAILED TO STATE VALID DUE PROCESS OR EQUAL PROTECTION CLAIMS

The issue to be determined here is whether Petitioners complied with the minimum requirements needed to properly plead a workplace safety claim based on a constitutional violation. Petitioners claim that Judge Hurley erred in granting

defendants' motions for judgment, arguing that the court misapplied the heightened scrutiny standard. However, Petitioners' argument is without merit since Petitioners failed to meet the minimum standard required by the Federal Rules of Civil Procedure and because the pleading standards were correctly applied by the District Court and Second Circuit.

Plaintiffs assert, in conclusory fashion, that Judge Hurley and the Court of Appeals applied a heightened pleading standard. Rule 8(a) of the Federal Rules of Civil Procedure requires "a short and plain statement of the claim showing that the pleader is entitled to relief." The Supreme Court has found that:

> [T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is a short and plain statement of the claim that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.

*Conley v. Gibson*, 355 U.S. 41, 47 (1957).

Petitioners cite to *Swierkiewicz v. Sorema*, 534 U.S. 506, 122 S. Ct. 992 (2002), in which the Supreme Court rejected the Second Circuit's heightened pleading standard in employment discrimination actions, finding the heightened standard conflicts with Federal Rule of Civil Procedure 8(a)(2). The Court held that an employment discrimination plaintiff need only satisfy the simple notice pleading requirements of the Federal Rules of Civil Procedure. *Swierkiewicz*, 534 U.S. at 515. The Court noted that employment discrimination complaints need not include facts establishing a prima facie case of discrimination under the standard announced in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), but must include "a short and plain

statement of the claim showing that the pleader is entitled to relief." Fed. Rule Civ. Proc. 8(a)(2); *Swierkiewicz*, 534 U.S. at 511.

This Court previously rejected the enhanced pleading standard in Section 1983 actions, such as the instant matter. *Leatherman v. Tarrant County Narcotics Intelligence Unit*, 507 U.S. 163, 168 (1993) ("We think that it is impossible to square the heightened pleading standard applied by the Fifth Circuit in this case with the liberal system of notice pleading set up by the Federal Rules"). The Fifth Circuit had expressly applied a heightened pleading standard to plaintiffs' claim in *Leatherman*. Nevertheless, the courts of appeals "require[ ] the pleader to disclose adequate information regarding the basis of his claim for relief as distinguished from a bare averment that he wants relief and is entitled to it." 5 C. Wright & A. Miller, Federal Practice and Procedure § 1202, p. 73 (2d ed. 1990).

Even a complaint that complies with the form requirements of Rule 8(a) is not insulated from a motion to dismiss based upon its substance. *Kirksey v. R.J. Reynolds Tobacco Co.*, 168 F.3d 1039, 1041 (7th Cir. 1999). Additionally, verbose complaints have been subject to dismissal. *Kuehl v. Federal Deposit Insurance Corp.*, 8 F.3d 905, 907 (1st Cir. 1993) ("Plaintiffs had proceeded to file a verbose and redundant complaint . . . the possible substance of the claim is hidden in prolixity"); *Magluta v. Samples*, 256 F.3d 1282, 1284 (11th Cir. 2001) ("any allegations that are material are buried beneath innumerable pages of rambling irrelevancies"). Here, too, Judge Hurley noted the Amended Complaint was "permeated by redundant verbiage and synonyms," yet failed to describe the due process claims with the required specificity. (Pet. App. at 11a-12a).

Petitioners argue the courts below bar misapplied the heightened pleading standard that was rejected by the Supreme Court in *Swierkiewicz*. This argument fails, however, because Petitioner in the case at bar failed to meet minimum standards for pleading as dictated in Rule 8(a). *Swierkiewicz*, 534 U.S. at 513. Petitioners were not required "to plead more facts than [they] may ultimately need to prove to succeed on the merits . . .". *Swierkiewicz*, 534 U.S. at 512. Plaintiffs simply neglected to plead the essential elements of a cognizable claim.

The answer to the third questions presented by Petitioners must therefore be an emphatic "no." Petitioners have not been denied due process and equal protection by either the Second Circuit or District Court because a heightened pleading standard was not applied. Similarly, Petitioners' fourth question, which jumps to absurd conclusions regarding municipal immunity, must be answered in the negative.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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